Supreme Court, U.S.
FILED

02 1182 FEB 10 2003
No. _____
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In The

Supreme Court of the United States

DONALD OATMAN,

Petitioner,

vs.

FUJI PHOTO FILM USA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a lawsuit claiming violations of the Americans With Disabilities Act ("ADA") is a prerequisite to prevailing in a claim for retaliation or a failure to reinstate under the Family Medical Leave Act ("FMLA") when the employee can return to work before the expiration of FMLA leave if a reasonable accommodation is available and the employer refuses to provide the accommodation?

   a. If an ADA lawsuit is required, then how could an employee do such within the 12 week period, and would not such a requirement nullify the intent and purpose of the conciliation process required by 42 U.S.C. § 12117?

2. Whether an employee who is on Family Medical Leave and has received Employee Retirement Income Securities Act benefits during the leave is entitled to reasonable accommodation under the ADA prior to the expiration of the 12 week FMLA leave or does the ADA not apply during the 12 week FMLA leave period?

3. Does the Americans With Disabilities Act's reasonable workplace accommodation apply to employees who have invoked the benefits and protections provided by the FMLA and the Employee Retirement Income Securities Act?

4. Does *Oatman* improperly encourage employers to ignore or stultify the reasonable accommodation requirement of the ADA by exempting employers from FMLA and ERISA liability in cases where the failure to accommodate the employee prevents the employee's more prompt return to work?

QUESTIONS PRESENTED FOR REVIEW – Continued

5. If an employee is unable to perform his job without reasonable workplace accommodation at the time his FMLA leave expires, does this inability to work, bar, as a matter of law, a discrimination claim for interference with the attainment of ERISA benefits when, but for the employer's interference, the employee would have been entitled to continued ERISA disability benefits *because* of the inability to work?

6. Is "qualification for the position" a required element of a *prima facie* ERISA discrimination claim, or should it be "otherwise qualified" to harmonize the ADA with the FMLA and ERISA to give all the anti-discrimination statutes equal harmonious effect?

7. If "qualification for the position" is a required element of a *prima facie* ERISA discrimination case, does the employee fail to establish this element if he is unable to return to work because he requires a reasonable accommodation, which the employer refuses to provide?

8. Do the ADA, FMLA and ERISA operate in a vaccum, i.e., does an employee's request and receipt of FMLA and ERISA benefits for a disability absolve an employer's obligation to determine if a reasonable workplace accommodation will permit an employee to return from FMLA leave and/or any resultant need for ERISA long term disability benefits?

PARTIES TO THE PROCEEDINGS

The following is a list of all parties to the proceedings in this case in the United States Court of Appeals for the Fifth Circuit:

1. Donald Oatman, Appellant-Petitioner
2. John E. Wall, Jr., Attorney for Appellant-Petitioner
3. Fuji Photo Film USA, Inc., Appellee-Respondent
4. Angelina LaPenotierre, Ann Marie Arcadi and the law firm of Carrington, Coleman, Sloman & Blumenthal, Attorneys for Appellee-Respondent

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in case no. 02-10346 affirmed the decision of the United States District Court for the Northern District of Texas, which granted summary judgment in favor of the Respondent on all claims. Without Oral Argument, the Fifth Circuit issued an unpublished Opinion on the Summary Calendar dated November 12, 2002 and reprinted here as Appendix 1-10. The district court's February 15, 2002 Final Judgment and Memorandum Opinion and Order are printed here as Appendix 11 and Appendix 12-19, respectively.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit entered on November 12, 2002.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

APPLICABLE STATUTES AND REGULATIONS

1. The statutes applicable to this case are as follows:

Americans With Disabilities Act of 1990:

General Rule

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in

regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and or other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a).

As used in subsection (a), the term discriminate includes . . . (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. . . . 42 U.S.C. § 12112(b).

Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having an impairment. 42 U.S.C. § 12102(2).

Qualified Individual with a Disability

The term "qualified persons with a disability" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such an individual holds or desires. 42 U.S.C. § 12111(8).

Reasonable Accommodation

> The term reasonable accommodation may include . . . (b) job restructuring, part time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C. § 12111(9).

Employee Retirement Income Security Act

Interference with protected rights

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . . 29 U.S.C. § 1140.

Family Medical Leave Act of 1993

Leave Requirement

(a) In general

(1) Entitlement to leave

> Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 work weeks of leave during any 12-month period for one or more of the following:
>
> . . .

> **(D)** Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee. 29 U.S.C. § 2612

Prohibited Acts

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter. 29 U.S.C § 2615

2. The regulations applicable to this case are as follows:

> If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans With Disabilities Act. 29 C.F.R. § 825.214(b).
>
> Nothing in the FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or disability. . . . FMLA

> is not intended to modify the Americans with Disabilities Act. . . . The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection. 29 C.F.R. § 825.702(a).
>
> If an employee is a qualified individual with a disability within the meaning of the Americans With Disabilties Act, the employer must make reasonable accommodations, etc., barring undue hardship, in accordance with the ADA. At the same time, the employer must afford an employee his or her rights under the FMLA. 29 C.F.R. § 825.702(b).

STATEMENT OF THE CASE

Basis for Federal District Court Jurisdiction:

Petitioner, Donald Oatman ("Oatman") brought suit against his former employer of 16 years, Respondent, Fuji Photo Film USA, Inc. ("Fuji"), claiming violations of the Family Medical Leave Act of 1993, 29 U.S.C. § 2601 and the Employee Retirement Income Security Act, 42 U.S.C. § 1140. Jurisdiction was proper in the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 1331.

Facts Material to Consideration of the Questions Presented:

Oatman's Termination

Donald Oatman was employed by Fuji from approximately June 7, 1982, until his termination on October 5,

1998. (App. 20; V1 101-02; V3 562) From 1985 until his termination, Oatman's job with Fuji was Warehouse Supervisor. *Id.* Oatman's supervisor from 1994 until October 1995 was Al Levine, Regional Human Resource Manager ("Levine"). (App. 20; V1 104-06)

In 1994, Oatman underwent surgery on his right knee due to continuous pain he was experiencing. (App. 20; V1 109; V3 562) Oatman requested and received a leave of absence from Levine following this knee surgery. (App. 20; V1 110; V3 562) However, after a three-week absence from work on short term disability, Levine insisted that Oatman return to work. (App. 20; V3 562) Levine promised to modify Oatman's Warehouse Supervisor position and reduce the physical demands of the job if Oatman would return to work early. (App. 20-21; V3 562) At Levine's insistence, and relying on Levine's assurances of reduced physical demands of the job, Oatman returned to work. (App. 21; V3 562)

Upon his return, however, Oatman soon realized that his position was not modified as promised. *Id.* The heavy physical demands of Oatman's job remained the same as before his first knee surgery. *Id.* Although Oatman attempted to follow his doctor's orders of restricted activity, to enable his knee to heal properly, he was criticized by Levine and only permitted 15 minute breaks at scheduled times. *Id.*

Because Oatman's knee problems continued to plague him following the first surgery, he required a second knee surgery in March of 1998. (App. 21; V1 156-57; V3 563) At that time, Oatman advised Levine that he would require a leave of absence for this second surgery which was needed

to address his recurring knee pain and problems. (App. 21; V1 154-55, 159; V3 563)

On April 6, 1998, James B. Montgomery, M.D., performed a second arthroscopic surgery on Oatman's right knee. (App. 21; V2 495) Oatman applied for and received short term disability on April 21, 1998. (App. 21) On July 3, 1998, CIGNA discontinued Oatman's short term disability payments. (App. 21; V1 196, 299-300, 320) Oatman was still unable to return to work; therefore, he applied for long term disability benefits. (App. 21; V2 330-31)

In July 1998, because Oatman continued to experience pain in his knee, he returned to his treating physician, Dr. Montgomery, for a bone scan. (V2 501-04) On August 4, 1998, Dr. Montgomery met with Oatman to discuss the results of the bone scan and to conduct a "physical ability assessment." (V2 325-28, 501-04) Dr. Montgomery stated in the assessment that, in an 8 hour work day, Oatman could sit for 8 hours, stand for 1 hour, and walk for 1 hour. *Id.* Dr. Montgomery further stated that Oatman could lift 10 to 20 pounds frequently, could carry 10 pounds occasionally and could push and pull continuously. *Id.*

On July 24, 1998, Levine sent Oatman a letter informing him that he was granted FMLA leave beginning June 20, 1998 which would continue through *October 9, 1998.* (App. 21; V1 215; V2 332-33)

Denial of Long Term Disability

In August 1998, after Oatman applied for long term disability benefits, CIGNA spent two days secretly video surveilling Oatman. (App. 22; V2 330-31, 513-14, 519-21; V3 563) On September 1, 1998, allegedly because of the

surveillance, CIGNA (Fuji's disability insurance carrier) contacted Dr. Montgomery regarding Oatman's application for long term disability benefits. (V2 513-14, 519-21) CIGNA advised Dr. Montgomery that Oatman had been investigated and videotaped for two days. *Id.* CIGNA informed Dr. Montgomery that the videotape captured Oatman walking and standing without any noticeable defect in his station or gait; however, CIGNA did not show the video to Dr. Montgomery. (V2 330-31, 513-14, 519-21) (No doubt because the videotape clearly reflects a defect in Oatman's station and gait. (App. 22; V3 563)) CIGNA also claimed that Oatman was allegedly observed standing for approximately 1 to 1½ hours. (V2 513-14, 519-21) On the videotape, however, Oatman constantly shifted his weight while standing and paced only a very short distance. (App. 22; V3 563)

Nevertheless, based on the information from CIGNA and without actually viewing the videotape, Dr. Montgomery modified Oatman's physical work restrictions. (V2 328, 330-31, 513-14, 519-21) Dr. Montgomery modified the sitting restriction in favor of a position that required no prolonged standing or walking. *Id.* Dr. Montgomery also noted that Oatman continued to have problems with his knee and that it would likely take 11 months to resolve. *Id.*

After contacting Dr. Montgomery, CIGNA contacted Levine regarding Oatman's job duties and requirements to purportedly determine if the job could be modified to be less strenuous. (V2 330-31; V3 525) Levine had allegedly told CIGNA that in a usual workday Oatman was required to sit 2 hours a day, stand 6 hours a day and walk 5 hours a day. *Id.* Levine also allegedly verbally informed CIGNA in a subsequent telephone conversation that Oatman had

the "freedom to change positions as needed." *Id.* Nevertheless, after Oatman was surveilled by CIGNA, the job requirements changed and Levine then claimed that Oatman's job only required him to stand 2 hours at a time as opposed to 6 hours. *Id.* Levine later claimed to CIGNA that Oatman's position only involved standing and walking up to 5 or 6 hours per day, that the standing and walking somehow could be performed in any combination, that Oatman had freedom to change position as needed, and that his occupation could involve more sitting than standing and walking. (V2 330-31) In reality, Oatman's job, prior to Levine's latest revision, required him to stand between 5 and 6 hours at a time. (App. 23; V3 563) However, if the job was as fluffy as Levine, Fuji and CIGNA claimed, Oatman could have returned to work. (App. 25; V3 565) (After all, imagine the latest position as described by Levine, but never implemented, a mercurial job description which essentially would have enabled Oatman to self-regulate the physical demands of his job. (V3 565))

In an apparent effort to fire Oatman and cut off his LTD, on September 3, 1998, CIGNA sent Oatman a letter advising him that CIGNA was denying his application for LTD benefits. (App. 23; V1 197; V2 330-31; V3 564) The next day, Oatman telephoned Levine to discuss the denial. (App. 23; V1 208-10; V3 564) Oatman asked Levine why he advised CIGNA that his occupation involved more sitting than standing and walking. (App. 23; V2 330-31; V3 564) Levine denied making this representation to CIGNA. *Id.* Levine then asked Oatman to provide him with medical proof of his continued need for leave. (App. 23; V2 339; V3 524, 564) In compliance with Levine's request, Oatman provided Levine with medical documentation from Dr.

Montgomery; however, Levine claimed that this documentation was insufficient because it pre-dated CIGNA contacting Dr. Montgomery. (App. 23; V1 177-78, 181-82; V2 324-28; V3 524, 564) When Oatman provided the documentation to Levine, he was unaware that CIGNA had contacted Dr. Montgomery. (App. 23; V3 525; 564) Oatman knew only that CIGNA was denying his claim for LTD benefits. *Id.* During this discussion, Oatman also advised Levine that he would be returning to see Dr. Montgomery on October 6, 1998. (App. 23; V3 564) The same day that CIGNA denied Oatman's claim for LTD benefits, CIGNA also wrote informing Fuji that Oatman's claim was denied and verified the amount of money that would have been disbursed had the claim not been denied. (V3 567)

Without explanation, on September 11, 1998, Levine sent Oatman a letter which countermanded the previous FMLA letter of July 24, 1998 and prescribed a return to work date of October 5, 1998 (rather than October 9th). (App. 24; V2 337; V3 524, 526, 564) Thus, after Levine learned of the anticipated October 6th doctor visit, Oatman's FMLA leave length was reduced to the day before his scheduled appointment with Dr. Montgomery. (App. 24; V3 564) No doubt Levine sought to force Oatman back to work prematurely and to cancel the doctor appointment, or, if he failed to return, he would be fired for job abandonment. Oatman previously had advised Levine that he could not return to work early because he wanted his knee to heal properly this time, unlike his failed recovery due to Levine's broken promises of less physical demands following the first surgery. (App. 24; V3 564)

On October 5, 1998, when Oatman failed to return to work, he was terminated by Fuji allegedly for an unauthorized leave of absence and failure to provide current

legitimate documentation regarding the reason he was absent from work. (App. 24; V1 193; V2 329; V3 523, 565) Oatman was terminated from Fuji even though: (1) Levine was aware that Oatman would be unable to return on October 5, 1998; (2) Oatman had provided documentation he possessed regarding his continued need for leave; (3) Oatman was scheduled to visit Dr. Montgomery on October 6, 1998; (4) Oatman was unaware that Levine would consider all previous documentation prepared by Dr. Montgomery insufficient; and (5) Oatman had previously been granted FMLA leave through October 9th. (App. 23-24; V1 215; V2 332-33; V3 525, 564)

Oatman's FMLA return date was unilaterally, and without justification, advanced to October 5, 1998, after Levine learned of the anticipated October 6, 1998 doctor visit. *Id.* Oatman was denied FMLA so that he could be terminated before he returned to his doctor on October 6, 1998 and obtain current documentation. (App. 23-24; V3 563-65) Oatman's accelerated termination to pre-date the next doctor visit revealed that Fuji's request for additional documentation was meaningless, and that the stated reason for termination was a pretext to discriminate and retaliate against Oatman in violation of the FMLA and ERISA. Moreover, Fuji completely avoided ADA workplace accommodation.

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT

1. The *Oatman* opinion abominates all efforts by the Legislature and the Judiciary to enforce anti-discrimination laws that encourage judicial economy while providing protection and guidance to both employers and employees. Specifically, the *Oatman* opinion condones unlawful conduct by employers and increased lawsuits by employees; to wit:

a. *Oatman* permits employers to violate the ADA by exempting the employer from liability under the FMLA if the employer prohibits its FMLA reinstatement by denying the employee the reasonable accommodations which may be required to enable an employee to return to work; and

b. *Oatman* requires disabled employees to file an ADA lawsuit to enforce a return to work before the expiration of FMLA leave; and

c. *Oatman* encourages the filing of ADA lawsuits and obliterates the EEOC's conciliation (non-judicial) process for resolution by permitting an employer to refuse workplace accommodation outright because the employee simultaneously sought FMLA leave.

By affirming summary judgment in *Oatman*, the Fifth Circuit reinforced a budding line of federal circuit case law which erroneously provides that compliance with the reasonable accommodation provision of the ADA is not required when an employee receives FMLA leave. *See Oatman v. Fuji Photo Film, U.S.A., Inc.*, No. 02-10346 (5th Cir. 2002) (App. 1-10); *Rinehimer v. Cemolift, Inc.*, 292 F.3d 375 (3rd Cir. 2002); *Holtzclaw v. DSC Communications*

Corp., 255 F.3d 254 (5th Cir. 2001); *Tardie v. Rehabilitation Hospital of Rhode Island,* 168 F.3d 538 (1st Cir. 1999). The *Oatman* opinion also goes one step further and holds that, even if there was "some interplay" between the ADA and the FMLA, for an employee to be protected under the ADA when attempting to return to work from FMLA leave, the employee must have sued the employer under the ADA, in essence, to enforce workplace accommodation. *See Oatman* at App. 6. In other words, according to *Oatman,* the filing of an ADA lawsuit is a prerequisite to prevailing in any FMLA claim where reasonable accommodation may be required for a return to work. *Id.* Because the FMLA is plainly not inapposite to the provisions of the ADA, and because the protections of the ADA are not exclusively triggered by the filing of a lawsuit, review by this Court of the *Oatman* decision is deserved.

The regulations of the FMLA provide that the protections of the FMLA are to be implemented in conjunction with the ADA. *See* 29 C.F.R. § 825.214(b). Specifically:

> If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations *may be governed by the Americans With Disabilities Act. (Emphasis added) See* 29 C.F.R. § 825.214(b);
>
> Nothing in the FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or disability. . . . FMLA is not intended to modify the Americans with Disabilities Act. . . . The purpose of the FMLA is to make

> leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection. *See* 29 C.F.R. § 825.702(a); and
>
> If an employee is a qualified individual with a disability within the meaning of the Americans with Disabilties Act, the employer must make reasonable accommodations, etc., barring undue hardship, in accordance with the ADA. At the same time, the employer must afford an employee his or her rights under the FMLA. *See* 29 C.F.R. § 825.702(b).

In harmony with the ADA, a "qualified person with a disability" is:

> an individual who, with or without reasonable accommodation, can perform *the* essential functions of the employment position that such an individual holds or desires. (Emphasis added) *See* 42 U.S.C. § 12111(8).

As such, the FMLA regulations countermand the First, Fifth and Third Circuits' reasoning that an employee returning from FMLA is not entitled to an ADA workplace accommodation. *See* 29 C.F.R. § 825.702(a) and (b); 29 C.F.R. § 825.214(b); *Oatman* at App. 6; *Holtzclaw* at 261; *Tardie* at 544; *Rinehimer* at 384. Under the ADA and the FMLA (as set forth in the regulations), an employer has a duty to make reasonable accommodations to a qualified individual with a disability, and both statutes are violated if the failure to reasonably accommodate prevents such an employee from returning to work before the expiration of FMLA leave when such a return is possible if the employee can perform all essential functions of the job with an accommodation. *See* 29 U.S.C. § 2612, § 2615; 42 U.S.C.

§ 12112; 29 C.F.R. § 825.214(b); 29 C.F.R. § 825.702(a) and (b). (Nary a better way to encourage productivity and discourage malingering.)

Not only does this "no reasonable accommodation required" line of case law defy the plain requirements of the ADA and the intent of the FMLA to honor such requirements, but it also tempts, if not outright condones and encourages, employers to openly violate the reasonable accommodation provisions of the ADA when faced with an employee attempting to return to work from FMLA leave who may require a reasonable accommodation. After all, under *Oatman*, a mendacious employer looking to exile a disabled FMLA-seeking employee could, upon the employee's attempt to return to work from FMLA leave, deny all necessary reasonable accommodations to the employee and revise the job description to deny ERISA benefits. The employer could thereby deny FMLA reinstatement and terminate the employee with impunity. Such a scenario is contrary to the intent of the FMLA prohibiting employers from discharging or in any other manner discriminating against an employee who seeks benefits under the FMLA. Further, the purpose of the ADA in providing a comprehensive national mandate for the elimination of discrimination against disabled individuals and providing for workplace accommodation becomes a nullity when FMLA leave is sought. *See* 29 U.S.C. § 2615(a) and (b); 42 U.S.C. § 12101(b)(1). Imagine the dialogue:

Employer: We cannot accommodate your disability any longer.

Employee: Okay, then I must seek FMLA leave to determine what I can do.

> Employer: If you do, I will fire you, but when you apply for LTD benefits, the workplace accommodations will return in your absence and cheat you out of your LTD benefits. When you schedule an appointment to see what the doctor says within the 12 week leave period, we will shorten your FMLA leave period to the day before the doctor visit and if you do not return you are fired.

Indeed, Hobson had no horse/choice.

Additionally, review by this Court is necessary to revoke the *Oatman* court's alarming caveat that, even if the FMLA and the ADA have "some level of interplay", the employee must nevertheless have filed an ADA lawsuit to invoke protection under the ADA. (App. 6) The *Oatman* opinion cites no supporting authority for this requirement, no doubt because the ADA is a prescriptive statute which obliges and protects all covered employers and employees without the necessity of litigation. *See* App. 6; 42 U.S.C. §§ 12101(b), 12102 and 12111. The reasoning that an employee must first file suit to be protected under the ADA is falacious and conveys an unsettling message to employees and employers, i.e., that employees must sue their employers under the ADA in any FMLA case where the effect of a reasonable accommodation may be an issue. Even more beguiling is *Oatman's* holding that absent an ADA lawsuit, there is no non-judicial protection to the disabled employee and any employee desiring an ADA accommodation must first sue the employer to receive the accommodation. (App. 6) Also, the ADA interactive process becomes the subject of judicial supervision. (App. 6) Further, *Oatman's* "ADA lawsuit requirement" renders

moot the entire conciliation process through the Equal Employment Opportunity Commission (or applicable state enforcement agency). *See* 42 U.S.C. § 12117.

The FMLA specifically requires compliance with the ADA and Oatman's summary judgment evidence established that Fuji manipulated and violated the ADA's reasonable accommodation requirement when terminating Oatman. Oatman's summary judgment evidence established that Oatman could be considered a "qualified individual with a disability" as defined under the ADA (and Fuji did not argue otherwise), thus entitling Oatman to ADA reasonable accommodations in conjunction with his rights under the FMLA. (V3 563-65) The district and circuit courts' findings that Oatman was too disabled to return to work were controverted by Fuji's own specious modification of the position description (which was utilized by Fuji and CIGNA in concert to deny Oatman employee benefits) and Oatman's Declaration that he could have performed the job of Warehouse Supervisor as modified (per Levine's oral modification to CIGNA). The modified position was so non-physical that Oatman should have performed the job, but rather, the modifications were retracted and Oatman was terminated.

It was error to grant summary judgment on the issue of Oatman's ability to perform his job without analyzing the issue and evidence of Oatman's ability to perform his job with reasonable accommodation (particularly when Fuji claimed the job was modified to procure denial of disability benefits). The facts of *Oatman* do not mandate summary judgment under *Holtzclaw, Rinehimer* and *Tardie* because in those cases the employee in question either did not raise the issue of an ADA reasonable accommodation or admitted an inability to work even with

reasonable accommodation. *See Holtzclaw* at 261 (employee admitted that he could not perform his job *even with accommodation.*); *Tardie* at 544 (employee admitted to being unable to work more than 40 hours per week, which was an essential job function for which there was no "reasonable" accommodation available); *Rinehimer,* at 381-82, 384 (after the court determined the employee did not have a "disability" as defined under the ADA, the employee did not assert that he was entitled to reasonable accommodation on his FMLA return). In contrast, Oatman submitted evidence that had he been offered the modified job as described by Levine to CIGNA, he could have performed the job, i.e., had he been offered reasonable accommodations he could have returned to work upon the expiration of his FMLA leave.[1] (V3 564-65) Further, Oatman disclosed that it was expected that his doctor would release him to return to work on a trial basis to assess his abilities after his scheduled October 6, 1998 appointment; however, Fuji prevented this occurrence by accelerating his FMLA return date and terminating Oatman the day before his doctor visit. (V1 235; V3 564-65).

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[1] This evidence was erroneously rejected by the Fifth Circuit as being contradictory to Oatman's deposition testimony. (App. 6-7) Although Oatman did testify in his deposition regarding his inability to work, upon review of this testimony, the questions posed (and the answers provided) did not consider the effect of a reasonable accommodation on Oatman's ability to return to work. (*See*, e.g., V2 235). Further, Oatman testified in his deposition that he was being released by his doctor to return to work on a trial basis to assess his abilities. (V2 235) Oatman's declaration also confirmed that he could have performed the modified job as described by Levine to CIGNA (when Fuji was attempting to cut off Oatman's benefits), but Oatman was never offered such an accommodation. (App. 25; V3 564-65)

That Oatman did not sue under the ADA should not negate the statutory protections which are afforded by the ADA (and clearly incorporated into the FMLA per the applicable regulations), nor should a failure to file an ADA lawsuit exempt an employer such as Fuji from liability under the FMLA as a matter of law. Review by this Court would clarify the protections of the ADA that are applicable in an FMLA context. It will also prevent the filing of an ADA lawsuit from being a prerequisite to prevailing in an FMLA claim.

2. *Oatman's* requirement that an employee be "qualified" for the job without any reasonable accommodation as a *prima facie* element of an ERISA case not only directly conflicts with the holdings of the Sixth and Tenth Circuits, but improperly metamorphasizes the holdings of the remaining Circuit Courts (as well as Fifth Circuit precedent) which include "qualification" as a *prima facie* ERISA element into a warped standard which defies both the ADA and the provision of ERISA which would otherwise protect an employee from employer interference with attainment of any ERISA benefits to which the employee is entitled by reason of the inability to work.

Relying on *Holtzclaw v. DSC Communications Corp.*, 255 F.3d 254 (5th Cir. 2001), the Fifth Circuit dismissed Oatman's ERISA claim after determining that Oatman was unable to physically perform his job. (App. 7-10) Notably, the issue of available workplace accommodation is ignored and which "job" Oatman was allegedly unable to perform is never delineated by the court, i.e., the first or second job description by Levine. (App. 7-10) This error warrants

review by this Court because, as in Oatman's FMLA claim, the Fifth Circuit utilizes ERISA to nullify the protections of the ADA.

In *Holtzclaw,* the Fifth Circuit held that it was joining its "sister circuits" in requiring that to establish a *prima facie* ERISA case the employee must be qualified to perform the job. *See Holtzclaw* at 260-61, *citing Clark v. Coates & Clark, Inc.,* 990 F.2d 1217, 1223 (11th Cir. 1993); *Henson v. Ligget Group, Inc.,* 61 F.3d 270, 277 (4th Cir. 1995); *Lehman v. Prudential Ins. Co. of America,* 74 F.3d 323, 330 (1st Cir. 1996); *McNemar v. Disney Store, Inc.,* 91 F.3d 610, 621 (3rd Cir. 1996); *Salus v. GTE Directories Serv. Corp.,* 104 F.3d 131, 135 (7th Cir. 1997); *Dister v. Continental Group, Inc.,* 859 F.2d 1108, 1114-15 (2d Cir. 1998). The *Holtzclaw* court further stated that it was "illogical" to allow one alleging discrimination under any employment discrimination statute to proceed with his suit if he is not qualified for the position. *Holtzclaw* at 261. (Note, somewhere "otherwise" fell from the lexicon as in "otherwise qualified" for the job.) The court elaborated that failing to require job qualification as an element of the *prima facie* case would belie the purpose of the discrimination statutes; to wit: to permit those who are qualified for jobs to seek remedies for prohibited acts of discrimination. *Id.* The *Holtzclaw* court further opined that the employment discrimination statutes do not prohibit discrimination in a vacuum, but only in the concrete context of a specific job or category of job. *Id.*

Such reasoning by the Fifth Circuit may well have been properly applied to dismiss the ERISA claim under the facts of *Holtzclaw* (or other cases where the employee admits an inability to perform the job even with reasonable accommodation); however, the facts in *Oatman*

demonstrate that the discrimination statutes should not be interpreted in a vacuum and that "job qualification" should not be a required element of every ERISA discrimination case. Whether an employee is "otherwise qualified" is the seminal question for the laws to be properly and not restrictively harmonized. Instead, under *Oatman,* the protections under ERISA are disharmonized with the ADA to the point where more lawsuits must be filed.

The injustice caused by a blind application of the *Holtzclaw prima facie* test to every ERISA claim is exemplified in *Oatman* and demonstrates the need for clarification by this Court on the requisite elements of a *prima facie* ERISA case. Specifically, because Oatman was not offered reasonable accommodation before his FML was accelerated, he was unable to return to work and was terminated. (App. 24-25) Had Oatman been told the position had been modified, he could have performed the position which he had held for the last 12 years (and for which he was obviously otherwise qualified). Instead, the job modification vanished and Oatman was left unable to return to work on October 5, 1998. In dismissing Oatman's ERISA claim because Oatman allegedly could not perform the job, the *Oatman* court ignored the existence of the ADA and its statutory obligation on employers to provide reasonable accommodations to otherwise qualified individuals with disabilities. App. 7-10; 42 U.S.C. § 12112(b).

Further, the holdings of *Oatman, Holtzclaw* and the remaining sister circuits which require job qualification as a *prima facie* ERISA discrimination case ignore the interplay between ERISA and the ADA and deviate from the holdings of the Sixth and Eighth Circuits which do not separate "otherwise" from "qualified" when defining a *prima facie* case of an ERISA violation. *See Walsh v. UPS,* 201

F.3d 718 (6th Cir. 2000); *Kinkead v. Southwestern Bell Telephone Co.,* 49 F.3d 454, 456 (8th Cir. 1995). This case should be heard to reconcile the division among the circuit courts as to the elements required to establish a *prima facie* ERISA case.

Further, the Eleventh Circuit noted that *prima facie* elements vary depending on the type of discrimination case and, recognizing that certain *prima facie* elements may not be applicable to all ERISA discrimination cases, held that the courts should avoid overly strict formulations of the *prima facie* case. *Clark v. Coates & Clark, Inc.,* 990 F.2d 1217, 1223 (11th Cir. 1993). Although the *Holtzclaw* court relied on *Clark,* the *Oatman* court when dismissing Oatman's ERISA claim on the "qualification" issue ignored this guidance.

Essentially, the *Oatman* court disregarded the distinction arising in cases involving attainment of disability benefits (that the employee is entitled to benefits because he is unable to work) and rigidly extended *Holtzclaw* beyond its logical application. After all, assuming *arguendo*, that Oatman was unable to perform his job at the time his FMLA leave expired, it was nevertheless error to grant summary judgment on Oatman's ERISA claim because it was this very inability to work that potentially entitled Oatman to benefits (long term disability) under Fuji's ERISA plan.[2] (V2 330) But for Fuji's interference with Oatman's LTD application, i.e., altering the job

[2] Under Fuji's LTD plan: "An employee will be considered Disabled if because of Injury or Sickness: 1. he is unable to perform all the material duties of his regular occupation. . . . " (V2 330)

description to obtain a work release and later recanting the modifications, Oatman would have qualified for LTD benefits. (V2 329, 330-31; V3 563-64) Fuji's interference with Oatman's attainment of rights under the ERISA plan was discriminatory. *See* 29 U.S.C. § 1140.

Thus, contrary to the Fifth Circuit's holding in *Oatman*, an inability to work actually supports, rather than bars, Oatman's ERISA claim because it is the inability to work that qualifies him for disability benefits. Additionally, the *Oatman* court erred by disregarding the effect an ADA accommodation would have on Oatman's ability to work. As discussed above, the interplay between the ADA and other employment discrimination statutes should be harmonized. The *Oatman* opinion permits the assertion of accommodation to deny ERISA benefits and the snatching back of accommodation upon denial of benefits just in time to terminate the employee.

CONCLUSION

The illusory offer of accommodation is much like the "Hobson Choice" when in reality there are no horses, i.e., regardless of what is chosen, neither employee in need of accommodation nor the man in need of a horse will receive what they are told is there for the taking.

The *Oatman* opinion deserves review by this Court in light of the erroneous notion that the filing of an ADA lawsuit is a prerequisite to prevailing in an FMLA claim. Review is further warranted to reconcile the conflict among the Circuit courts regarding the elements of a *prima facie* ERISA discrimination case. The opinion

further necessitates review to address the impact of the reasonable accommodation requirement of the ADA in both ERISA and FMLA claims and to correct the current majority Circuit case law holding that reasonable accommodation is not required under the reinstatement provision of the FMLA. The *Oatman* opinion plainly exemplifies that armed with the current Circuit case law, employers may freely violate the reasonable accommodation requirement of the ADA, and in the process, also extricate themselves from liability under the FMLA and ERISA.

For the above reasons, Petitioner Donald Oatman, respectfully requests that his Petition for a Writ of Certiorari be granted by this Court.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-10346
SUMMARY CALENDAR

DONALD OATMAN,

Plaintiff-Appellant

v.

FUJI PHOTO FILM USA, INC.,

Defendant-Appellee.

Appeal from the Unites States District Court
for the Northern District of Texas
(3:00-CV-2116-R)

(Filed Nov. 12, 2002)

Before REYNALDO G. GARZA, JONES, and EMILIO M. GARZA, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:[1]

In this appeal we review a district court's decision to grant summary judgement in favor of Defendant, Fuji Photo Film USA ("Fuji"), regarding all claims brought by Plaintiff Donald Oatman ("Oatman") under the

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[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

anti-retaliation provision of the Employee Retirement Income Security Act ("ERISA"), 42 [sic] U.S.C. § 1140, and the Family Medical Leave Act of 1993 ("FMLA"), 42 [sic] U.S.C. § 2601. For the following reasons, we affirm the district court's judgment.

I.

Donald Oatman was employed by Fuji for more than fifteen years. From 1985 until his termination on October 5, 1998, Oatman's position at Fuji was that of Warehouse Supervisor. At all times relevant to this litigation, Oatman was supervised by Al Levine ("Levine"), Regional Human Resources Manager.

In the early 1990s, Oatman began to experience problems with one of his knees. He was granted leave to have surgery performed on the knee in 1994. Three weeks after the surgery, Oatman returned to work. Oatman again required medical attention because of the knee in 1998, and on March 31 of that year was granted leave to undergo a second surgical procedure. Following the second surgery, which took place on April 6, 1998, Oatman applied for and received short-term disability benefits from CIGNA, Fuji's health insurance carrier. When CIGNA discontinued his short-term disability payments on July 3, 1998, Oatman, still unable to return to work, applied for long-term disability benefits. On July 24, 1998, Levine sent Oatman a letter informing him that his leave had been continued as unpaid FMLA leave, beginning July 20, 1998 and running through October 9, 1998. Oatman was terminated on October 5, 1998.

On September 27, 2000, Oatman filed suit against Fuji in the Northern District of Texas, alleging violations

of his rights under the FMLA and Section 510 of ERISA. Oatman argued his termination occurred while he was still entitled to leave under the FMLA, and that Fuji's failure to restore him to his former position, or an equivalent position, was wrongful. Relatedly, Oatman claimed he was terminated and discriminated against due to his exercise of rights under the FMLA and ERISA. Pursuant to Fed. R. Civ. P. 56, Fuji moved for summary judgment on all claims, arguing that Oatman had neither evidence he was entitled to FMLA leave or reinstatement, nor had he evidence that his employment was terminated in violation of the FMLA or ERISA. The district court granted Fuji's motion for summary judgment and Oatman appeals.[2]

II.

We review a grant of summary judgment de novo, applying the same standard as the district court. *See Terrebonne Parish School Board v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 310 (5th Cir. 2002). Summary judgment is proper only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. Pro. 56(c). If the moving party meets its initial burden of showing that there is no genuine issue of material fact, the burden shifts to the nonmoving party to produce evidence establishing a factual issue. *See Evans v. Houston*, 246 F.3d 344, 348 (5th Cir. 2001). Although we draw all reasonable

[2] Plaintiff's original suit also included claims under Sections 409 and 502 of ERISA. On appeal, Oatman does not challenge the district court's summary judgment ruling that both of these claims were barred due to his failure to exhaust administrative remedies.

inferences in favor of the nonmoving party, conclusory allegations unsupported by concrete and particular facts are insufficient to defeat a motion for summary judgment. *See Terrebonne*, 290 F.3d at 310; *Hugh Symons Group, PLC v. Motorola, Inc.*, 292 F.3d 466, 468 (5th Cir. 2002); *Marshall v. East Carroll Parish Hosp. Serv. Dist.*, 134 F.3d 319, 324 (5th Cir. 1998).

A. Oatman's FMLA Claims

The district court found that Fuji was entitled to summary judgment regarding Oatman's FMLA claims because Oatman failed to show that he was eligible to be reinstated when his FMLA leave expired, as required under the FMLA. Oatman argues that the district court's dismissal of his FMLA claim is misplaced because the court failed to consider the effect of reasonable accommodation on his ability to return to work.

Under the FMLA, an employee is entitled, upon returning from FMLA leave, to be restored "to the position of employment held by the employee when the leave commenced" or "an equivalent position." 29 U.S.C. § 2614(a)(1). In addition:

> If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However the employer's obligations may be governed by the Americans With Disabilities Act (ADA). See § 825.702.

29 C.F.R. § 825.114(b). Furthermore, if an employee is able to return to work upon the expiration of FMLA leave,

the employer will then be liable for failing to restore the employee to their former position. *See* 29 U.S.C. § 2614(a)(1)(A); *see also Holmes v. E. Spire Communications Inc.*, 135 F.Supp.2d 657 (D.Md. 2001) (holding that plaintiff's FMLA claim was precluded as a matter of law because of the admitted fact that plaintiff could not have returned to work on the date she believed her FMLA leave ended).

Oatman does not deny that he was unable to perform the essential functions of his job at Fuji. In fact, according to Plaintiff's own deposition testimony, he could not have returned to work on October 9, 1998 – the date when Oatman alleges his FMLA leave ended. Rather, Oatman argues that, *had he been offered reasonable accommodations*, he could have returned to work upon the expiration of his FMLA leave – i.e., he would have been able to perform the essential functions of his position if he had been offered reasonable accommodations. Under the FMLA, however, there is no right to reinstatement with "reasonable accommodations." Indeed, existing case law suggests otherwise. *See, e.g., Tardie v. Rehabilitation Hospital of Rhode Island*, 168 F.3d 538, 543-44 (1st Cir. 1999) (finding no right to reinstatement where employee was unable to work more than forty hours each week and it was established that an essential function of her job was working between fifty and seventy hours per week).

Apparently recognizing that the FMLA does not independently provide for reinstatement with reasonable accommodations, Oatman calls attention to the last sentence of 29 C.F.R. § 825.114(b), which refers both to the Americans With Disabilities Act and to 29 C.F.R. § 825.702. Oatman argues that 29 C.F.R. § 825.114(b)

should apply in conjunction with § 825.702, which, in part, provides:

> If an employee is a qualified individual with a disability within the meaning of the Americans With Disabilities Act, the employer must make *reasonable accommodations*, etc., barring undue hardship, in accordance with the ADA. At the same time, the employer must afford an employee his or her rights under the FMLA.

29 C.F.R. § 825.702(b) (emphasis added).

Undoubtedly, as Plaintiff suggests, there is some level of interplay between the FMLA and the ADA. However, it does not necessarily follow that Oatman is entitled to the relief he seeks. Significantly, Oatman did not assert a claim under the ADA in this case. Other than simply stating that the FMLA should be considered in conjunction with the ADA, Plaintiff offers no authority to support his assertion that the FMLA requires an employee to be reinstated with reasonable accommodation at the end of FMLA leave. Had Plaintiff pursued a claim under the the ADA, the issue of reasonable accommodation might have been pertinent. Because Oatman did not bring such a claim, however, the issue is not relevant to the resolution of this portion of his case. Furthermore, as the discussion below regarding Oatman's ERISA claim shows, Oatman did not present competent summary judgment evidence regarding his ability to return to his previous position, even if accommodation had been provided.

Under the FMLA, Oatman must show that he was able to return to his previous position when his FMLA leave expired. Oatman does not deny that at the end of his leave he was unable to perform the essential functions of

his job at Fuji. Therefore summary judgment was appropriate as to Plaintiff's FMLA claims.

B. Oatman's Section 510 ERISA Claim

Under Section 510 of ERISA, it is unlawful to "discharge . . . or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled." 29 U.S.C. § 1140.

To survive summary judgment, the employee must demonstrate genuine issues of material fact with regard to whether the employer terminated the employee with the "specific intent" to interfere with the employee's ERISA rights or to otherwise retaliate against the employee for exercising her rights under the ERISA plan. *See Stafford v. True Temper Sports*, 123 F.3d 291, 295 (5th Cir. 1997); *Hines v. Mass. Mutual Life Ins. Co.*, 43 F.3d 207, 209 (5th Cir. 1995). The employee is not required to show that the employer's sole motivation was to interfere with ERISA rights, but rather that a specific intent partly motivated the employer. *See Nero v. Industrial Molding Corp.*, 167 F.3d 921, 927 (5th Cir. 1999).

To meet this burden, absent direct evidence of discrimination, Plaintiff must present a prima facie case of discrimination. *See Bernal v. Randall's Food & Drugs, Inc.*, No. CA 3-96-CV-3464-R, 1998 WL 246440, at *12 (N.D. Tex. March 24, 1998). If a prima facie case is established, the burden shifts to Fuji to present a legitimate, non-discriminatory reason for the alleged discriminatory conduct, at which point the burden shifts back to Plaintiff

to show that the proffered reason is a mere pretext for discrimination. *Id.*

To establish a prima facie case of discrimination under ERISA, a plaintiff must establish that his employer fired him in retaliation for exercising an ERISA right or to prevent attainment of benefits to which he was potentially entitled under an employee benefit plan. *See Holtzclaw v. DSC Communications Corp.*, 255 F.3d 254, 260 (5th Cir. 2001); *Stafford*, 123 F.3d at 295. In addition, this court requires the Plaintiff to show that he was physically qualified for the position sought. *See Holtzclaw*, 255 F.3d at 260-61.

The district court found that, because Oatman was unable to show he was physically qualified for his prior position – as required under *Holtzclaw* – Fuji was entitled to summary judgment on Plaintiff's claim under Section 510 of ERISA. Oatman argues that *Holtzclaw* is not dispositive of this case because the employee in *Holtzclaw* admitted that he could not perform his job, even with an accommodation. The *Holtzclaw* court found that, "Because Holtzclaw has not shown he is qualified for the position he seeks, either with or without an accommodation, he can pursue his ERISA claim no further." *See Holtzclaw*, 255 F.3d at 261. Oatman argues that the district court's judgement on this claim should be reversed because the summary judgment evidence established issues of material fact regarding the Plaintiff's ability to perform the job if provided with reasonable accommodations. The summary judgment evidence Oatman refers to, however, fails to establish an issue of material fact regarding his ability to perform the job, with or without reasonable accommodations.

Plaintiff relies solely on his Declaration to support the assertion that he would be able to perform his job with reasonable accommodations. Oatman's Declaration, however, directly contradicts his prior sworn interrogatory responses and deposition testimony. As discussed earlier, Oatman does not deny that he was unable to perform the essential functions of his job as of the day he asserts his FMLA leave would have expired. In fact, he testified under oath that this was the case. Furthermore, Oatman testified that he did not believe there was any other job at Fuji he could he [sic] have performed, that he had not even looked for a job because of his condition, and that he did not think he would be able to perform any job between the date of his deposition and the age of 65 as a result of the problems with his knee.

"It is well settled that this court does not allow a party to defeat a motion for summary judgment using an affidavit that impeaches, without explanation, sworn testimony." *S.W.S Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir. 1996); *Thurman v. Sears Roebuck & Co.*, 952 S.2d 128, 137 n.23 (5th Cir. 1992), *cert. denied*, 506 U.S. 845 (1992); *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984); *see also Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236-37 (7th Cir. 1991) (nonmovant cannot create a genuine issue of material fact by contradicting his own earlier statements unless he offers a plausible explanation for the incongruity). Oatman fails to offer any explanation for this contradiction and therefore his Declaration is not competent summary judgment evidence.

According to the Plaintiff's own testimony, he could not physically perform the essential functions of his former job. Because Plaintiff is unable to show that he is

physically qualified for his prior position, he cannot establish an element of his prima facie case. Fuji is therefore entitled to summary judgment on Oatman's claim under Section 510 of ERISA.

III.

For the foregoing reasons, we AFFIRM the district court's grant of Fuji's motion for summary judgement.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DONALD OATMAN, *Plaintiff*,	§	
v.	§	CA 3:00-CV-2116-R
FUJI PHOTO FILM U.S.A., INC. *Defendant*.	§	

FINAL JUDGMENT

(Filed Feb. 15, 2002)

Defendants' Motion for Summary Judgment was GRANTED as to all claims on February 15, 2002. Pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is ORDERED that Plaintiff's case against Defendant is DISMISSED with prejudice. It is further ORDERED that costs are taxed against the Plaintiff.

Signed the 15 of February, 2002.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
UNITED STATES DISTRICT
JUDGE
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DONALD OATMAN,	§	
	§	
Plaintiff,	§	**CA 3:00-CV-2116-R**
v.	§	
FUJI PHOTO FILM U.S.A. INC.	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

(Filed Feb. 15, 2002)

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant's Motion for Summary Judgment is before the Court. Plaintiff Donald Oatman ("Oatman" or "Plaintiff") filed this suit against Defendant Fuji Photo Film U.S.A., Inc. ("Fuji" or "Defendant"), alleging violation of his rights under the Family Medical Leave Act ("FMLA") and the Employee Retirement Income Security Act ("ERISA"), Sections 409, 502, and 510. For the reasons stated below, Defendants' Motion for Summary Judgment is GRANTED as to all claims.

Plaintiff was employed by Fuji for over fifteen years, the majority of the time as Warehouse Supervisor. His supervisor at all pertinent times was Al Levine ("Levine"), Human Resources Manager. Oatman began having knee problems in the early 1990s. Oatman first sought medical attention for his knee problem in 1994, when he was granted leave to have knee surgery. Three weeks after the surgery, Oatman returned to work. Oatman again had problems with the same knee in 1998, and on March 31,

1998, was granted leave to have another surgery. Oatman was subsequently granted short term disability by Fuji's health insurance carrier, CIGNA, and was informed by his supervisor Levine in July 1998 that his leave had been continued as unpaid FMLA leave, expiring on October 9, 1998. Oatman was then terminated on October 5, 1998.

Defendant moved for summary judgment on all counts. Defendant argues Plaintiff is not entitled to relief under FMLA for the following reasons: (1) Plaintiff was not qualified for FMLA leave at the time of his termination; (2) Plaintiff was not entitled to reinstatement upon the expiration of his leave; and (3) Plaintiff cannot establish as a matter of law that Defendant's reason for termination was a pretext for discrimination. Defendant further argues that Plaintiff is not entitled to relief under ERISA for the following reasons: (1) Plaintiffs claims under Sections 409 and 502 of ERISA are barred both because Plaintiff failed to exhaust administrative remedies and because Defendant is not a fiduciary as defined by ERISA; and (2) Plaintiff cannot show as a matter of law that his termination was a pretext for discrimination under Section 510 of ERISA.

III. ANALYSIS

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure allows summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Melton v. Teachers Ins. & Annuity Ass'n of Am.,* 114 F.3d 557, 559 (5th Cir. 1997). The court must resolve all reasonable doubts in the

light most favorable to the party opposing the motion. *See Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1272 (5th Cir. 1994). As long as there appears to be some support for the disputed allegations such that reasonable minds could differ as to whether or not the allegation is true, the motion must be denied. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

A defendant who seeks summary judgment bears the initial burden of demonstrating an absence of a genuine issue of material fact by either submitting summary judgment evidence that negates the existence of a material element of the plaintiff's claim or by identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrates the absence of evidence to support a material element of the plaintiff's claim. *See Celotex*, 477 U.S. at 323; *Lynch Props., Inc. v. Potomac Ins. Co.*, 140 F.3d 622, 625 (5th Cir. 1998). Once the defendant has satisfied its initial burden, the plaintiff must go beyond the pleadings and by its own affidavits or depositions, answers to interrogatories, and admissions on file set forth specific facts showing a genuine issue for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment for the defendant will be granted if the plaintiff fails to make a showing sufficient to establish a material issue of fact as to the existence of an element essential to its case. *See Celotex*, 477 U.S. at 322.

B. Plaintiff's FMLA Claims

First, Defendant asserts that Plaintiff's inability to return to work when his FMLA was set to expire renders

Plaintiff unable to recover as a matter of law. The summary judgment evidence indicates that Plaintiff admitted in his deposition that he could not have returned to work on October 9, 1998, when Plaintiff thought his FMLA leave ended. Furthermore, the summary judgment evidence shows that, at the time of Plaintiff's deposition on May 15, 2001, Plaintiff was still not physically able to perform the job he held at Fuji.

Under the FMLA, the employee must show that he was eligible to be reinstated to his position of employment when his FMLA leave expires. "If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA." 29 C.F.R. § 825.214(b); *see also Sarno v. Douglas Elliman-Gibbons & Ives, Inc,* 183 F.3d 155, 161-62 (2d Cir. 1999) (explaining that if, at the end of the FMLA's twelve week leave period, an employee is unable to perform the essential functions of her former job, then "[a]ny lack of notice of the statutory twelve week limitation on FMLA leave could not rationally be found to have impeded" the employee's return to work).

Defendant also relies on *Holmes v. E. Spire Communications, Inc.,* 135 F.Supp.2d 657 (D.Md. 2001), arguing that for there to be a substantive violation of an employee's FMLA rights because they were terminated when they were on FMLA leave, the employee must have been able to return to work on the date that they thought their leave ended. *Holmes,* 135 F.Supp.2d at 665. In *Holmes,* the plaintiff alleged that her substantive rights were violated when she thought her FMLA leave, granted because of her pregnancy, ended on March 31, 1998, and

she was terminated on March 17, 1998.[1] The defendant moved for summary judgment, and the court determined that, even when making all inferences in favor of the non-movant, plaintiff's FMLA claim was precluded as a matter of law because of the admitted fact that the plaintiff could not have returned to work on March 31, 1998. The plaintiff testified that she was not able to return to work until April 16, 1998, at the earliest. *See Holmes,* 135 F.Supp.2d at 665.

The situation in *Holmes* is very analogous to the case at hand. In both cases, the employee was terminated before their FMLA leave had expired. Oatman's claim, however, appears to have less merit than the plaintiff's claim in *Holmes.* The plaintiff in *Holmes* was willing and able to return to work without restrictions a few weeks after the end of her leave, but Oatman admits that he still cannot perform the essential functions of his former job.

Furthermore, FMLA claims have been precluded where the plaintiff was no longer able to perform their former job for the same number of required hours. *See Tardie v. Rehabilitation Hosp. of Rhode Island,* 168 F.3d 538, 543-44 (1st Cir. 1999). Deposition testimony of the plaintiff conceding that he was still under work restriction when his FMLA leave expired also precluded pursuit of an FMLA claim. *See Williams v. Toyota Motor Mfg. Kentucky, Inc.,* 224 F.3d 840, 844-45 (6th Cir. 2000). Courts have also dismissed FMLA claims based upon the employers refusal to provide alternate employment, as this is clearly not

[1] The plaintiff and her employer had some confusion and differed on what was the start date of her FMLA leave.

required under the FMLA. *See Williams v. Saad's Healthcare,* No. 99-1070-BH-S, 2000 WL 362038, at *2 (S.D. Ala. Mar. 16, 2000).

Under the FMLA, Oatman must show that he was eligible to be reinstated to his position of employment when his FMLA leave expired, and Oatman does not deny that at the end of his leave he was unable to perform the essential functions of his job at Fuji. Therefore, Defendant is entitled to summary judgment on all of Plaintiff's FMLA claims.

C. Plaintiff's ERISA claims

Plaintiff filed three separate ERISA claims, requesting relief under ERISA Section 502 for withholding of benefits, ERISA Section 409 for breach of fiduciary duty, and ERISA Section 510 for pretext for discrimination.

i. Plaintiff's claims under Section 409 and Section 502 of ERISA

The Section 409 claim and the Section 502 claim are easily handled together. This court has previously held that, in order to recover benefits under these sections, the claimant must exhaust all administrative remedies. *See Bernal v. Randall's Food and Drugs, Inc.,* No. CA 3-96-CV-3464-R, 1998 WL 246640, at *9 (N.D. Tex. Mar. 24, 1998). In *Bernal,* this Court dismissed the claims of an injured worker for failure to exhaust administrative remedies. The plaintiff in *Bernal* was injured on the job and made no attempt to use the administrative remedies of the defendant before filing a suit for damages under ERISA.

The summary judgment evidence in this case indicates that Oatman, like the plaintiff in *Bernal,* did not exhaust his administrative remedies prior to bring [sic] his suit for damages under ERISA. Therefore, Defendant is entitled to summary judgment on Plaintiff's claims under Section 409 and Section 502 of ERISA.

ii. Plaintiff's claim under Section 510 of ERISA

The inquiry into whether Section 510 has been violated turns on whether the employer had the specific intent to interfere with the employee's rights. Interference with these rights does not have to be the "sole reason" for the termination but the plaintiff must show more than "the incidental loss of benefits as a result of the discharge." *Bernal,* 1998 WL 246640 at *11. This burden of proof can be met in two ways: (1) with direct evidence of discrimination; or (2) with circumstantial evidence through the Title VII burden-shifting scheme to establish a *prima facie* case.

Since *Oatman* provides no direct evidence of discrimination, this case must be analyzed under the Title VII burden-shifting scheme. In order to establish a *prima facie* case under Section 510, the employee must show: (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled. *See Bernal,* 1998 WL 246640 at *12 (citations omitted). In addition to these requirements, the Fifth Circuit requires the plaintiff to show that he was physically qualified for the position sought as a fourth element of the *prima facie* case. *See Holtzclaw v. DSC Communications Corp.,* 255 F.3d 254,

260-61 (5th Cir. 2001). In *Holtzclaw,* the plaintiff was granted permanent disability and later attempted to regain his former position. When the plaintiff was denied his former position, he brought suit. The Fifth Circuit held that because the plaintiff did not show he is qualified for the position he seeks, either with or without accommodation, he could not pursue his ERISA claim further. *Id.* at 261. Oatman's situation is similar to the plaintiff in *Holtzclaw* because Oatman also admits he cannot physically perform the position in question. Therefore, because Oatman is unable to show he is physically qualified for his prior position as a required *prima facie* element, Defendant is entitled to summary judgment on Plaintiff's claim under Section 510 of ERISA.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is GRANTED as to all claims. IT IS SO ORDERED.

SIGNED THIS 15 DAY OF FEBRUARY 2002.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DONALD OATMAN,	§	
Plaintiff,	§	
	§	
V.	§	**CIVIL ACTION NO.**
	§	**3:00-CV-2116-R**
FUJI PHOTO FILM U.S.A., INC.,	§	
	§	
Defendant.	§	

DECLARATION OF DONALD OATMAN

I, Donald Oatman, make the following Declaration. I am aware that this Declaration will be filed in a federal court and that it is the legal equivalent of a statement under oath and/or an affidavit. All of the matters expressed herein are true and correct and are of my personal knowledge. I am the Plaintiff in the above-styled case and I hereby state the following under penalty of perjury:

> I was employed by the Defendant, Fuji Photo Film (Fuji) from approximately June 7, 1982, until my termination on or about October 5, 1998. I was a Warehouse Supervisor at Fugi [sic] from approximately 1985 until my termination in 1998. My supervisor from about 1994 until October 1998 was Al Levine, Regional Human Resource Manager
>
> In 1994, I required surgery on my right knee due to continued pain and discomfort. I requested and received a leave of absence from Levine following the surgery. After three weeks away from work on short term disability, Levine insisted I returned to my position as Warehouse Supervisor. Levine promised to modify my position and

reduce the physical demands of the job if I would return to work early. So at Levine insistence and based on the assurance he made to me of reduced physical demand in my job I returned to work at Fuji. Upon my return, I soon realized that my position was not modified. I was back doing what I did before my knee surgery. I tried to follow my doctor's orders so that my knee would heal properly but I was criticized by Levine and only allowed to take breaks at scheduled times. Therefore my knee continue to bother me because the job was still physically demanding. All of my performance reviews leading up to and following the surgery were positive.

My knee did not heal properly following my knee surgery in 1994. So in March of 1998, my right knee again required surgery. I advised Levine that I would be requiring another leave of absence due to the scheduled surgery to address my recurring knee pain and problems. Levine granted me leave. On April 6, 1998, Dr. James Montgomery performed arthroscopic surgery on my right knee again. I applied for and received short term disability on April 21, 1998. However, on July 3, 1998, CIGNA discontinued my short term disability payments. I was still unable to return to work so I sought long-term disability benefits.

On July 24, 1998, Levine sent me a letter informing me that I was granted FMLA as of June 20, 1998, and FMLA would continue through October 9, 1998. I later received a letter in September of 1998 from Levine stating that my leave would end October 5, 1998 rather than October 9, 1998.

In July of 1998, I underwent a bone scan prescribed by Dr. James Montgomery. Then on or

about August 4, 1998, I met with Dr. Montgomery to discuss the results of the bone scan and conduct a "physical ability assessment." Dr. Montgomery stated in the assessment that in an eight hour work day I could sit for eight hours, stand for one hour, and walk for one hour. Dr. Montgomery further stated that I could lift ten to twenty pounds frequently, could carry ten pounds occasionally and could push and pull continuously. Attached as App. pp. 26-28 and Pl. Dep. Ex. 3, 6 which are true and correct copies.

In or around August of 1998, for some reason unknown to me, CIGNA decided to investigate me after I applied for long term disability. I have learned was surveilled for two days. During the two day surveillance I was observed standing for approximately an hour and a half. CIGNA claims that the video shows me walking and standing without any noticeable defect in my station or gait. However, the videotaped surveillance clearly shows defect in my station and gait. I had to constantly shift my weight while standing and paced only a very short distance. Whenever I was walking I was limping and while standing I was constantly shifting my weight and in many instances leaning against a car or fixed objects. CIGNA's claim that the video shows no effect in station or gait is false. I was never favored with a copy nor was I able to view the video until after my attorney issued a subpoena for the video.

I have learned, after the surveillance a case manager, Kathy Peters, from CIGNA contacted Dr. Montgomery and informed him of the surveillance and allegedly what was observed in the video. Base [sic] on this information Dr. Montgomery modified my restrictions. (See Pl. Dep. Ex. 4). I was not aware he had modified my

restrictions nor was I aware at the time that CIGNA had contacted Dr. Montgomery. After CIGNA contacted Dr. Montgomery, CIGNA allegedly called Levine. Levine allegedly told CIGNA that in a usual workday I was required to sit 2 hours a day, stand 6 hours a day and walk 5 hours a day. Levine also allegedly informed CIGNA that I had "freedom to change positions as needed." This information is untrue. I was required to stand between 5 and 6 hours a day. (See Pl. Dep. Ex. 6 and Levine Dec. ¶¶14,16,17/App. p. 32)

On September 3, 1998, Karen Drosendahl, from CIGNA sent me a letter advising me that I was being denied long term disability benefits. The letter bases the denial in part on information provided by Levine in which he incorrectly tells CIGNA that my occupation can involve more sitting than standing and walking. (See Pl. Dep. Ex. 6) The next day I contacted Levine to discuss the denial. Levine denied telling CIGNA that my job involved more sitting than standing and walking. Levine then asked me to provide him with medical proof of my continued need for leave. I complied with the request and provided Levine with medical documentation. I provided Levine all of the documentation I had available. I still had not been released to return to work by Dr. Montgomery. I told Levine that I had an upcoming visit with Dr. Montgomery on October 6, 1998. (Pl. Dep. Ex. 2-4). Levine now claims that the documentation I provided him was insufficient because it pre-dated CIGNA contacting Dr. Montgomery. However, I was unaware that CIGNA contacted Dr. Montgomery at that point in time. I only knew that CIGNA was denying my claim for long term disability

and that Levine was now questioning my leave of absence.

On September 11, 1998, Levine sent me a letter which stated that I must return to work by October 5, 1998, or my position would be filled. Coincidentally this date was one day before the date I told Levine that I would be seeing my doctor again. In response to the letter I called Levine on the telephone. I had a telephone answering system during this period of time and Levine never once, that I recall called me on the phone. He would fed-ex letters to me. During our phone conversation Levine again asked me if I could return earlier. I told Levine that I could not return early this time because I wanted my knee to heal properly this time. I also told Levine that I had a doctor's appointment on October 6, 1998, and that I would call him after the appointment and let him know what the doctor said about my knee condition. Levine indicated that would be fine and that I should contact him after the doctor's appointment.

On October 5, 1998, when I did not return to work at Fuji, I was terminated for alleged unauthorized leave of absence and failure to provide current legitimate documentation regarding why I was absent from work. I was terminated from Fuji October 5, 1998 despite the fact that I told Levine that I had to check with my doctor on October 6, 1998, before I could return to work. Levine indicated in no way to me that there would be a problem with me not coming in on October 5, 1998, as long as I called him October 6, 1998 following my appointment.

If Fuji really provided modification to my job such that the job would only require a combination of standing and walking only up to 5-6 hours a day, not all at once and could be done in any combination with complete freedom to change position as needed and that my job at times would involve more sitting (5-6 hours a day) than standing and walking I can and could do that. However, when I asked Levine in a telephone conversation if he had said such to CIGNA, he denied it.

I provided Fuji everything I could to satisfy their requests and never failed to respond to any request made. No one from Fuji advised how my documentation was allegedly insufficient.

I have read the foregoing and declare under penalty of perjury all of the matters recited herein are true and correct and of my personal knowledge.

/s/ Donald Oatman
Donald Oatman

No. 02-1182

Supreme Court, U.S.
FILED
MAR 14 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DONALD OATMAN,

Petitioner,

v.

FUJI PHOTO FILM USA, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an employee can sustain a claim for termination in violation of the Family and Medical Leave Act ("FMLA") when the employee was permitted to take FMLA leave for 188 days and admits that he could not perform the essential functions of his position with or without reasonable accommodation at the time of his termination – and, indeed, did not believe that he would ever be able to hold another job through retirement age?

2. Whether an employee can sustain a claim under § 510 of the Employee Retirement Income Security Act ("ERISA") when the employee admits that he was not qualified for the position from which he was terminated because he could not perform the essential functions of his job with or without reasonable accommodation at the time of his termination (or until the age of 65) and when there is no evidence that the employer acted with the intent to interfere with any ERISA benefits?

PARTIES TO THE PROCEEDINGS AND DISCLOSURE PURSUANT TO RULE 29.6

In addition to the parties to the proceeding listed in the Petition for Writ of Certiorari, Fuji adds the following: Jennifer Burr Altabef, Carrington, Coleman, Sloman & Blumenthal, L.L.P., Counsel of Record for Respondent.

Pursuant to Rule 29.6, Fuji identifies the following parent corporations: Fuji Film America Co., Inc. and Fuji Photo Film Co., Ltd. There is no publicly held company owning 10% or more of Fuji's stock.

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APPLICABLE STATUTES AND REGULATIONS

In addition to the statutes and regulations cited at pages 1-5 of the Petition, Fuji Photo Film USA, Inc. ("Fuji") directs the Court to the following regulation which may be relevant to its consideration of the Petition for a Writ of Certiorari ("Petition"):

> Employers are obligated to make reasonable accommodation only to the physical or mental limitations resulting from the disability of a qualified individual with a disability that is known to the employer. Thus, an employer would not be expected to accommodate disabilities of which it is unaware. If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed. When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation. Appendix to 29 C.F.R. § 1630; excerpt from § 1630.9 (1992).

STATEMENT OF THE CASE

Petitioner Donald Oatman's ("Petitioner") statement of the case omits or obscures several critical and indisputable facts. Indeed, this case concerns an employee who was permitted to take nearly 27 weeks of FMLA leave – more than twice the amount required by the FMLA – before he was terminated. As discussed below, the termination came

only after Fuji was made aware of information suggesting that he was not using his extended FMLA leave for its intended purpose, and after Petitioner failed to provide information (despite repeated requests) to establish that continued leave was necessary. Fuji clarifies Petitioner's statement of facts as follows:

Petitioner's suggestion that Regional Human Resources Manager Al Levine ("Levine") insisted that Petitioner return to work in 1994 and promised to modify his position is without basis. Petition, p. 6. Petitioner testified that he elected to return to work after three weeks, and that Fuji did not require him to do so. (1 R 110:1-10; 116:14-21) Petitioner also testified that he did not request any accommodation (other than leave for surgery) to address his problems with his knee between 1994 and 1998. (1 R 120:13-21)

Although Plaintiff was scheduled to commence his FMLA leave for his second knee surgery on April 6, 1998, he requested and was permitted to leave one week earlier due to pain in his knee. (1 R 159:13-21; 1 R 154:25-155:14; 3 R 523, ¶5) Levine approved the early departure, advising Plaintiff to "take care." (*Id.*)

On July 24, 1998, when Levine sent Petitioner a letter informing Petitioner that he had been granted FMLA leave beginning July 20, 1998, and running through October 9, 1998, Petitioner had already been on FMLA leave for one hundred and fifteen (115) days. (1 R 215:2-10; 2 R 332-334)

Petitioner's reliance on his interpretation of the contents of the videotape is purely speculative. Indeed, Petitioner neglects to advise the Court of the response of Plaintiff's treating physician, Dr. James B. Montgomery,

to the information from CIGNA, Fuji's disability insurance carrier, regarding its interpretation of the videotape. Based on this information, Dr. Montgomery advised CIGNA that he would rescind the sitting restriction noted in his August 4, 1998 progress note regarding Petitioner. (2 R 513:24-514:18; 2 R 519-521; 2 R 330-331) When asked whether Petitioner could return to work, Dr. Montgomery could not provide CIGNA with any reason why Petitioner could not. (2 R 514:14-18; 2 R 519-521; 2 R 330-331) Petitioner testified that he had no reason to believe that what Dr. Montgomery told CIGNA was false. (1 R 212:16-214:4)

Petitioner's suggestion that Levine changed his description of Petitioner's job duties is much ado about nothing. Levine told CIGNA that Petitioner's job responsibilities involved a combination of sitting and walking up to five (5) to six (6) hours per day. (2 R 330-331) Levine also told CIGNA that Petitioner's occupation had "the freedom to change position as needed" and, at times, could "involve more sitting than standing and walking." (*Id.*) CIGNA did not ask Levine whether Petitioner's application for long-term disability benefits should be granted or denied, and Levine did not offer an opinion. (3 R 525, ¶17; 3 R 525-526, ¶18) Levine did not know whether the information he provided would support or hurt Petitioner's claim for long-term disability benefits. (3 R 525-526, ¶18) Significantly, Fuji does not have the authority to tell, advise, or ask CIGNA to grant or deny claims. (3 R 526, ¶20)

While Petitioner contends that he was not aware that CIGNA had contacted Dr. Montgomery, the record clearly reflects that Petitioner received from CIGNA a letter sent on September 3, 1998, in which CIGNA advised Petitioner that CIGNA had denied his application for long-term

disability benefits. (1 R 197:4-6; 2 R 330-331) In its letter, CIGNA told Petitioner the results of its videotaped surveillance of his activities and the information it had obtained from Dr. Montgomery, including the fact that Dr. Montgomery had not been able to provide any reason why Petitioner could not return to work. (2 R 330-331) On or about September 4, 1998, Petitioner contacted Levine at Fuji to discuss the letter he had received from CIGNA regarding the denial of his application for long-term disability benefits. (1 R 206:3-208:1) During the phone call, Petitioner discussed with Levine the reasons for CIGNA's determination as set forth in its September 3, 1998 letter, including the fact that Petitioner had been videotaped standing and walking with no noticeable defect and that Dr. Montgomery had removed his sitting restriction and had not been able to give CIGNA any reason why Petitioner could not return to work. (2 R 330-331; 3 R 523, ¶8)

While Petitioner contends Oatman's return date was "unilaterally and without justification" advanced, there was very good justification for the request that Oatman return to work on October 5, 1998. Specifically, the new information regarding Petitioner's condition caused Levine to question the legitimacy and appropriateness of Petitioner's desire for continued FMLA leave. (3 R 524, ¶9) Levine then commenced a series of communications with Petitioner to determine the status of Petitioner's condition and to determine when Petitioner intended to return to work, including:

- September 4, 1998: Levine sent Petitioner a letter advising Petitioner that he needed to know the status of Petitioner's condition. (3 R 524, ¶9; 2 R 335-336) Levine asked Petitioner

to contact him by September 8, 1998, and advised Petitioner that failure to contact Levine could result in disciplinary action up to and including termination. (3 R 524, ¶9; 2 R 335-336)

- September 11, 1998: Levine sent Petitioner another letter advising Petitioner that business needs dictated that Petitioner must return to work by October 5, 1998. (3 R 524, ¶9; 2 R 337) Levine advised Petitioner that if he were unable to return to work by October 5, 1998, his position would be filled. (*Id.*) Levine asked Petitioner to let him know if he could return to work any sooner than October 5, 1998, but did not require that Petitioner return before October 5. (*Id.*)

- September 24, 1998: Levine sent Petitioner a letter advising that Petitioner needed to contact Levine immediately to discuss his return to work status. (3 R 524, ¶9; 2 R 338) Levine again advised Petitioner that failure to contact Levine could result in disciplinary action up to and including termination. (*Id.*)

- Mid-September 1998: Levine called Petitioner to ask him to provide information from his doctor justifying Petitioner's supposed need to continue his leave. (3 R 524, ¶9; 1 R 162:22-163:24) Petitioner understood the telephone call and letters from Levine to be requests for documentation from his doctor regarding the seriousness of his health condition and the continued need to be on leave. (1 R 162:22-165:14; 1 R 190:6-191:8)

Ultimately, Petitioner sent Levine three medical records from Dr. Montgomery regarding his medical

condition: (1) a progress note from his July 21, 1998 appointment; (2) a physical ability assessment completed by Dr. Montgomery at or prior to Petitioner's August 4, 1998 appointment with Dr. Montgomery; and (3) a progress note from Petitioner's August 4, 1998 appointment with Dr. Montgomery. (1 R 177:13-178:19; 1 R 181:12-182:3; 2 R 324-328; 3 R 524, ¶10) Each of these records pre-dated the videotaped surveillance of Petitioner, Dr. Montgomery's conversation with CIGNA in which he revoked earlier limitations on Petitioner's ability to work, and the denial of long-term disability benefits to Petitioner by CIGNA. (2 R 324-328; 2 R 513:18-515:8; 2 R 519-521; 3 R 524, ¶10) More importantly, none of the documents established that Petitioner was using his FMLA leave for its intended purpose, as the documents failed to establish that Petitioner could not return to work. (2 R 324-328; 3 R 524, ¶10)

Petitioner failed to return to work on October 5, 1998. (3 R 524, ¶11) As a result, Petitioner's employment was terminated due to his failure to return to work from an unauthorized leave and his failure to provide current, legitimate written documentation regarding his continued absence. (1 R 193:3-10; 2 R 329; 3 R 524, ¶¶10-11) At the time of his termination, Petitioner had been on a leave of absence since March 31, 1998 – a total of 188 days, or more than six months. (1 R 185:6-24; 3 R 523, ¶5) Throughout the entire 188 days, Fuji kept Petitioner's position open for his anticipated return. (3 R 523, ¶7)

Petitioner testified that as of October 9, 1998, the date his FMLA leave was originally scheduled to expire, he still was unable to perform the essential functions of his former position at Fuji. (1 R 235:2-4; 2 R 265:9-14) Petitioner also testified that he had not looked for any employment since

March 31, 1998, because he believed that he could not hold down any job as a result of his knee pain. (1 R 86:17-87:1) Indeed, Petitioner did not believe he would ever be able to perform a job again. (2 R 257:7-14) Petitioner's physician never released Petitioner to work five to six hours standing per day. (2 R 510:6-13)

REASONS FOR DENYING THE WRIT

Midway through this case, Petitioner realized that he wished he had filed a claim under the Americans With Disabilities Act ("ADA"). Having already given sworn deposition testimony negating an ADA claim, however, Petitioner also wished he could change that testimony. Petitioner now asks this Court to reverse the fact findings of the district court, as affirmed by the Fifth Circuit, which were based on Petitioner's own sworn deposition testimony. Petitioner also asks this Court to pervert the judicial process by holding that the filing of a lawsuit under one statute permits a plaintiff to later bring an alternate, unpleaded cause of action under another statute when the plaintiff loses on the first statute. Because the "errors" Petitioner asserts amount to nothing more than his disagreement with the lower courts' factual findings and application of the law, the Petition should be denied.

1. The Facts Set Forth in Petitioner's "Questions Presented" Are Not the Facts in This Case.

As a fundamental matter, each of the questions set forth at page i. of the Petition presuppose a factual situation in which Petitioner could have returned to work with a reasonable accommodation. However, both the district

court and the Court of Appeals found that Petitioner could not have returned to work – with or without a reasonable accommodation. In fact, the Court of Appeals specifically found as follows:

> Oatman does not deny that he was unable to perform the essential functions of his job as of the day he asserts his FMLA leave would have expired. In fact, he testified under oath that this was the case. Furthermore, Oatman testified that he did not believe there was any other job at Fuji he could he [sic] have performed, that he had not even looked for a job because of his condition, and that he did not think he would be able to perform any job between the date of his deposition and the age of 65 as a result of the problems with his knee.

(*See Oatman v. Fuji Photo Film USA, Inc.*, No. 02-10346 (5th Cir. 2002), Petition App. at 9; *see also Oatman v. Fuji Photo Film USA, Inc.*, No. 3:00-CV-2116-R (N.D. Tex. 2002), Petition App. at 15-16) Petitioner's ongoing attempt to disavow his sworn deposition testimony (without any explanation for the contradiction) before this Court is an improvident use of the writ, and the Petition should thus be denied.

Notably missing from Petitioner's claim is any evidence that he actually requested a reasonable accommodation that would have permitted him to return to work in October 1998. In Petitioner's mind, as evidenced by his deposition testimony, there was no reasonable accommodation that could have permitted him to return to work. In any event, "it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed." 29 C.F.R. app. § 1630.9 (1992). Because Petitioner

did not request any accommodation, the questions he presents in his Petition are simply inapplicable to his case. Accordingly, the Petition should be denied.

2. Petitioner Does Not Demonstrate a Legitimate Split Among Circuit Court Opinions on Any Material Issue in This Case.

a. Petitioner Does Not Identify Any Circuit Conflict Concerning Issues Related to His FMLA Claim.

Notably, Petitioner does not even suggest that the Fifth Circuit's opinion in this case conflicted with other circuits or with any law or regulation. In fact, Petitioner concedes the Fifth Circuit's opinion was consistent with existing case law in other circuits, noting that the Fifth Circuit "reinforced a budding line of federal circuit case law. . . . " Petition, p. 12. Petitioner instead asks this Court to overrule the entire line of cases because they stand for the proposition that "compliance with the reasonable accommodation provision of the ADA is not required when an employee receives FMLA leave." Petition, p. 12. This is a clear misinterpretation of these cases, as none of them makes such a statement. To the contrary, the Fifth Circuit in the present case specifically noted that there may be times when the protections of the ADA are invoked in connection with FMLA leave, a situation which might occur when a plaintiff requests a reasonable accommodation. However, as discussed above, the Fifth Circuit correctly determined that this was not such a case.

The federal regulations clearly state, "If an employee is unable to perform an essential function of the position because of a medical or mental condition, including the

continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA." 29 C.F.R. § 825.214(b). Petitioner offers no authority whatsoever to contradict the conclusion that the FMLA does not incorporate an accommodation provision. Instead, Petitioner points to the ADA's provisions regarding reasonable accommodation and asserts that his FMLA claim should be considered "in conjunction with the ADA." (Petition, p. 13) Petitioner misinterprets the references within the FMLA regulations to employers' independent responsibilities under the ADA (and other discrimination statutes) as permitting him to morph or clone his FMLA claim into a claim under a different statute. (Petition p. 14-16) Not surprisingly, Petitioner fails to cite any authority for this position as there simply is none. Had Petitioner pursued a claim under the ADA, the feasibility of a reasonable accommodation *might* have been a relevant issue in this case (although Petitioner's own assertion that no reasonable accommodation existed would have barred his claim). Because Petitioner did not bring such a claim, however, the question of a reasonable accommodation did not arise. As the various Circuit Courts are consistent and correct in their interpretation of this issue, the writ should be denied.

b. Petitioner's Attempt To Manufacture a Split Among Circuit Courts With Regard to the Elements of a *Prima Facie* Case of ERISA Discrimination is Without Merit.

In finding that Petitioner failed to establish a *prima facie* case of discrimination under § 510 of ERISA (29 U.S.C. § 1140), the Fifth Circuit held that qualification for a position was an essential element of a *prima facie* case.

See Oatman, No. 02-10346, Petition App. 8-10, *citing Holtzclaw v. DSC Communications Corp.*, 255 F.3d 254 (5th Cir. 2001). In so holding, the Fifth Circuit joined the First, Second, Third, Fourth, Seventh, and Eleventh Circuits in requiring evidence of qualification for a position as part of the *prima facie* case of an ERISA discrimination claim. To justify review of this widely-accepted legal precedent, Petitioner resorts to the desperate maneuver of manufacturing a split among circuits, advising the Court that the holdings of the Sixth and Eighth Circuits "do not separate 'otherwise' from 'qualified' when defining a *prima facie* case of an ERISA violation." Petition, p. 21-22, *citing Walsh v. UPS*, 201 F.3d 718 (6th Cir. 2000) and *Kinkead v. Southwestern Bell Telephone*, 49 F.3d 454 (8th Cir. 1995). Neither of these cases, however, discusses the concept of "otherwise qualified" or "qualified." Moreover, Petitioner fails to cite this Court to any discussion of how this distinction would affect this line of cases or justify review.

In *Walsh*, for example, the Sixth Circuit noted that a plaintiff can state a *prima facie* case by showing the existence of: (1) prohibited employer conduct; (2) taken for the purpose of interfering; (3) with the attainment of any right to which the employee may become entitled. *Id.* at 728. The Sixth Circuit was not asked to address the question of whether a plaintiff must be qualified (or indeed, "otherwise qualified") to establish a *prima facie* case of ERISA discrimination. Indeed, a plaintiff's lack of qualification for a position would certainly dispel any assertion that the plaintiff was removed from the position for the purpose of interfering with the attainment of ERISA benefits, and would therefore destroy any attempt at a *prima facie* case.

In *Kinkead*, the Eighth Circuit offered an even more generic outline of a *prima facie* case of ERISA discrimination, finding that "a claimant must demonstrate a causal connection between the likelihood of future benefits and an adverse employment action." *Id.* at 457. In *Kinkead*, the court found that the plaintiff failed to present a *prima facie* case of retaliation because she presented no evidence that her termination was motivated by a desire to prevent her application for additional disability benefits. *Id.* Indeed, the evidence clearly established that the plaintiff was terminated for poor attendance and poor job performance – explanations which could reasonably be construed as establishing the plaintiff was not qualified for the position. Thus, neither *Walsh* nor *Kinkead* is in conflict with circuits that have held that qualification for a position is an element of a *prima facie* case of ERISA discrimination.

Petitioner also suggests that the *Oatman* and *Holtzclaw* cases are in conflict with the Eleventh Circuit's admonition in *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217 (11th Cir. 1993). In noting that the elements of a *prima facie* case may vary according to the type of discrimination alleged, the *Clark* court cited *Alphin v. Sears, Roebuck & Co.*, 940 F.2d 1497, 1550 (11th Cir. 1991). In *Alphin*, the court concluded that the plaintiff could establish a *prima facie* case of age discrimination by showing that (1) he was in a protected age group and was adversely affected by an employment decision; (2) that he was qualified for his current position or to assume another position at the time of discharge or demotion; and (3) evidence by which a fact finder might reasonably conclude that the employer intended to discriminate on the basis of age in reaching the decision at issue. Thus, in *Alphin*, the court held that

although qualification and membership in a protected category were essential elements, the final element – evidence of intent to discriminate – could be established in a number of alternate ways depending on the facts and circumstances of the particular case. Petitioner's attempt to imply that the 11th Circuit somehow suggested that qualification was not essential is simply without merit.

3. The Petition Should Not be Granted Because Petitioner Has Otherwise Failed to Demonstrate Any Factual Basis for His Claims.

a. This Court's Decision in *Ragsdale v. Wolverine World Wide, Inc.* Bars Petitioner's FMLA Claim.

Even assuming the question of a reasonable accommodation were relevant to Petitioner's FMLA claim, Petitioner still cannot prevail. Under the FMLA, an employee is entitled to only twelve (12) weeks of FMLA leave, during which the employee's position must be held open for his return. 29 U.S.C.A. § 2612 (West 2002). Prior to his termination, Petitioner enjoyed one-hundred eighty-eight (188) days of leave (nearly 27 weeks) during which his position was held open for his return. (1 R 155:2-14; 1 R 185:6-24; 1 R 223:15-24; 3 R 523-524, ¶¶ 5, 7, 11) In *Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (U.S. 2002), this Court rejected a plaintiff's assertion that her termination after thirty weeks of continuous leave was in violation of the FMLA because her employer had never notified her in writing that such leave would count against her FMLA entitlement. This Court found that to prevail on this claim, the plaintiff must show an impairment of rights or resulting prejudice as a result of the lack of notice. *Id.* at 1162. Here, there is no evidence that Petitioner suffered

any impairment of his rights or resulting prejudice as a result of Fuji's notice that it was designating his leave as FMLA leave several months after his leave started. To the contrary, the evidence clearly established that Petitioner would not have returned to work had he been notified that his FMLA leave would expire on June 23, 1998 (twelve weeks from the commencement of his leave). Indeed, Petitioner still believed he was unable to perform any work at the time of his deposition on May 15, 2001. (1 R 86:17-87:1)

b. Petitioner Failed to Establish a *Prima Facie* Case of Discrimination Under § 510 Because He Did Not Demonstrate That Fuji Acted With Specific Intent to Interfere With ERISA Rights.

Petitioner's claim for long-term disability benefits was denied over a month before he was terminated. Thus, Fuji's termination of Petitioner could not have interfered with Petitioner's right to these benefits. (Notably, Petitioner did not invoke his right to appeal CIGNA's denial of long-term disability benefits despite being advised how to initiate such an appeal. (Pl. Dep. 129:17-20; 228:19-229:20)) In an argument completely unrelated to any case law, and underscoring the frivolous nature of this Petition, Petitioner asserts that "but for Fuji's interference with Oatman's LTD application, Oatman would have qualified for LTD benefits." Petition at 22-23. Petitioner's argument, however, is based on his continued misunderstanding of the individual decisions and actions involved. CIGNA, not Fuji, denied Petitioner's application for long-term disability benefits after determining, based on its own independent surveillance, that Petitioner was not eligible for long-term

disability payments. (2 R 330-31) Despite Petitioner's continued confusion on this point, there is no evidence that Fuji was a decisionmaker with regard to the determination or acted with intent to interfere with Petitioner's application for LTD benefits. (3 R 525-26, ¶ 17, 18, and 20)

Fuji was, however, the decisionmaker with regard to Petitioner's termination, and the decision had nothing to do with the merits of Petitioner's claim to CIGNA for long-term disability benefits. Upon learning that Petitioner's claim for long-term disability benefits had been denied by CIGNA and learning of other information that cast doubt on the validity of Petitioner's continued need for FMLA leave, Fuji asked Petitioner to do one of two things: either provide Fuji with information establishing his continued need for FMLA leave or return to work. (1 R 162:22-165:14; 2 R 335-38; 3 R 524, ¶¶ 9, 11) Petitioner failed to do either of these things, and was thus terminated for failing to return from an unauthorized leave. (3 R 524, ¶¶ 10-11)

Despite Petitioner's attempt to portray these independent decisions as inconsistent and nefarious, the evidence clearly establishes that the decisions are consistent with the information received (or not received) by each decisionmaking entity. Because Petitioner failed to present evidence that Fuji acted with the intent to interfere with his ERISA rights, Petitioner could not prevail on his ERISA claim; accordingly, the writ should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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